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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

v.

J. HOWARD MCGRATH, *Attorney General*, as Successor to the Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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J. HOWARD MCGRATH, *Attorney General* as Successor to the Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Cities Service Company and The Chase National Bank of the City of New York respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinions Below

The opinion of the United States District Court, Southern District of New York, is reported at 93 F. Supp. 408 (R. 43). The opinion of the United States Court of Appeals for the Second Circuit is reported at 189 F. 2d 744 (R. 55).

Jurisdiction

The judgment of the Court of Appeals was entered June 13, 1951 (R. 62). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statute and Executive Orders Involved

The statute here involved is the Trading with the Enemy Act, 50 U. S. C. App. §§ 1 *et seq.;* and the Executive Order is 9193, 7 F. R. 5205 (which amended Executive Order 9095), as amended, 10 F. R. 6917. Pertinent provisions are set forth in the appendix beginning at p. 19.

Statement

By Vesting Order No. 12960, dated March 11, 1949, the Attorney General, as Successor to the Alien Property Custodian* purported to vest as property of a German national resident in Germany the "debt or other obligation" evidenced by, and "all rights in, to and under" three Cities Service Company negotiable bearer debentures (R. 8-10). Two of the bonds** were issued under an Indenture dated June 2, 1930, and one under an Indenture dated March 1, 1929 (R. 33-34). The Chase National Bank of the City of New York (hereinafter referred to as the Bank) is trustee and paying agent under both indentures.

The present action is one by the APC to compel, from the debtor and from the Bank, either the payment of, or the issuance of new bonds for, the three bonds asserted to have been vested. The bonds themselves are not in the possession of the APC (R. 5). In fact, the APC as-

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* For convenience, the letters APC are used herein to designate whatever official was at the time administering the vesting program, together with the office under him.

** The instruments here were fully negotiable bearer debentures under seal (R. 34, 46, 56). Since for the present purposes there is no difference between a debenture and a bond under seal, the two terms are used interchangeably.

serted that the bonds were outside the United States (R. 14, 18, 56) and according to information given the APC they had been seized by the occupying authorities of the Russian sector of Berlin long before the purported vesting order (R. 32, 56).

One of the three bonds, with appurtenant coupons, had already been presented for payment at the Bank's offices in New York, and had been paid in usual course before the date of the Vesting Order (R. 32, 45, 55). The claim as to this bond has been dropped. Another of the three bonds was presented to the Bank in New York for payment on January 5, 1950 on behalf of Globe & Rutgers Fire Insurance Company—indisputably a non-enemy concern; was returned by the Bank unpaid because of the Vesting Order and is now apparently in the possession in New York of a New York brokerage firm (cf. R. 32-33, 45, 55).

The parties do not know where the third bond is (R. 33, 55). For the purposes of this case it must be assumed that it is physically outside the United States. The APC has made no effort to join the possessors of the bonds.

Neither of the governing indentures makes provision for the issuance of a new debenture to replace one already issued, except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen, *and* provision made for adequate indemnity satisfactory to the debtor and the trustee against possible liability. Payment either of the debentures or of the coupons appertaining thereto is expressly conditioned, both in the debenture itself and in the governing indenture, upon presentation of the instruments. (See particularly Art. II, Sec. 9 of each indenture.) Under both indentures the debtor covenanted not to issue any debentures thereunder except in accordance with its provisions. (See Art. II, Sec. 6 of each indenture.)

The present action was instituted January 30, 1950 (R. 1). The District Court (McGohey, *D. J.*) granted petitioners' motions for summary judgment (R. 49). The court

held that, since in the case of a negotiable bearer bond the instrument embodies the property right, the vesting order was unauthorized in that it sought to vest property which was not "subject to the jurisdiction of the United States" or "within the United States" as required by the Trading With the Enemy Act and Executive Order 9193, as amended (R. 43).

The Court of Appeals reversed the judgment of the district court, and directed summary judgment for the APC (R. 63, 64). The court, apparently relying partly on the broad language of the Act as to debts and choses in action, and partly on the practical power of the United States over the debtor and the trustee present in the United States, held that the Act did apply to bonds of United States issue located abroad. The court did not discuss what Congress in the statute and the President in the Executive Order intended in imposing the limitations that the property be "subject to the jurisdiction of the United States" and "within the United States"; and indeed the court did not discuss the Executive Order at all. Recognizing the force of the argument that petitioners were under the threat of double liability because of possible judgments abroad, against which the Act's exculpatory provisions offered inadequate protection, the Court of Appeals reached the conclusion that any resulting taking of the petitioners' property would not be in violation of the Fifth Amendment, because an implied promise to compensate on the part of United States would then arise. It is not clear from the opinion of the court when it thought the "taking" of the obligors' property would occur or whose act would give to the obligors a present right to compensation. In some passages it would appear that the court thought that the adverse judgment of a foreign tribunal would, in some manner, amount to a "taking" *by the United States*; in other passages, it would appear that the court felt that the vesting by the APC constituted the "taking" but that such "taking" would not become complete and no obligation to compensate would arise until the entry of the foreign judgment. The court

did not specify any statutory provisions under which the debtor or trustee could proceed against the United States to recover compensation. Its opinion did not consider the other constitutional problem: i. e., whether the insufficiency of the statutory notice provided by the Act as to innocent non-enemy holders of the bonds, and the short statute of limitations for suits against the APC under the Act, if coupled with inability to obtain a remedy against the obligors, would deprive such bondholders of their constitutional rights under the Fifth Amendment.

Questions Presented

1. Are the Trading with the Enemy Act, which requires that property to be vested be "subject to the jurisdiction of the United States", and Executive Order 9193, as amended, which requires that it be "within the United States", properly to be construed as authorizing the vesting of all rights under negotiable bearer bonds physically located outside the United States and never seized?*

2. Can the Act and Executive Order be construed as permitting, as an inevitable result of the vesting, the taking and retention of property of persons not determined to be "enemy nationals" or acting for "enemy nationals"?*

3. Can the APC, by a purported vesting without manucaption, change the obligation on a negotiable bearer bond so as to compel its reissue or payment without either surrender or provision for adequate indemnity?

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* The APC's power to vest is only that given by the President in the Executive Order, since the Act merely authorized vesting upon the terms designated by the President (see § 5(b)). Therefore, if the Executive Order's authority is narrower than that of the Act, the terms of the Executive Order will control.

Only § 2(c) of the Executive Order can be here relied upon by the APC to support his vesting. His authority to vest under that section is confined to the situation where the property is that of an enemy national and is "within the United States."

4. As the Act provides expressly that the only relief for any person having any claim to any property transferred to the APC is the relief provided in the statute,* and as the Act fails to provide any remedy to a non-enemy citizen deprived of his property by the imposition of double liability, can a right to compensation for such a taking be implied? Is such an implied obligation to compensate—where the basis is so uncertain and the manner and time of enforcement are not provided for—sufficient to save the statute, as construed and applied in this case, from unconstitutionality under the Fifth Amendment?

5. If on the other hand the obligors are protected from double liability, will not the vesting of foreign-held bonds under these circumstances deprive innocent non-enemy holders of bonds of their property without notice or opportunity to be heard?

Reasons for Granting the Writ

The court below has interpreted the Trading with the Enemy Act in such a way as to sustain the APC in the exercise of a power the existence of which, so far as can be determined, had never previously been urged before any court in the 34 years of the statute's existence. Whether or not this new extension comes as a result of a change in the administrative construction of the Act and Order, the fact that it comes so late is significant. The importance of this federal statute has increased rather than diminished since 1945, when it was thought the "shooting war" had stopped.

We urge that the court below was in error. Whether it was right or whether it was wrong, however, the importance of the decision, because of the effect on new administrative policies and on legal principles, is such as to call for this Court's present determination of the issues.

1. From the point of view of direct impact, it is apparent that others than the immediate parties and

* See § 7(c).

unknown holders of the bonds in issue are affected by the decision. Indeed, the precise issues of this case govern the validity of a large number of vesting orders of a like nature either recently issued or scheduled for issuance in the latter part of 1951 pursuant to the publicly announced program of the Department of Justice (see Press Release, Department of Justice, January 19, 1951; also New York Times, January 20, 1951, p. 22, cols. 2, 3), involving a vast number of foreign-held bonds of American issue, the location and present holders of which are unknown, including the several thousands of such bonds scheduled in the APC's General Ruling No. 5B (16 F. R. 539-545).

In view of the wide scope of the vesting program, the pace at which it is administered and the short statute of limitations (which commences with the effective date of a vesting order rather than with delivery of the property affected*), it is important that this Court pass on the APC's authority as soon as possible. Since difficult questions of possible liability to third persons are involved, and since the decision of the Court of Appeals is rested on views sharply in conflict with established principles (as will be outlined in more detail below), other obligors on bonds can hardly regard as conclusive this decision by an intermediate court. Time-consuming and expensive litigation both for the Government and for private parties may be avoided if this Court passes on the question now. Moreover, the instant case is ideal for the test. The facts are not in dispute; the record is simple and clear; and the issues are sharply drawn, without extraneous matters.

2. From a broader point of view, the decision below has far-reaching implications, both in its effect in impairing the negotiability of negotiable instruments (an impairment which will necessarily result in injury to many innocent purchasers) and in its unforeseeable effects on the concept of territorial limitations of sovereignty. It is petitioners' contention that the court below was wrong in

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* Act, § 33; 8 C. F. R. § 504.1

attributing to Congress any intention either to impair negotiability or to depart from usual concepts of the extent to which the national power may justifiably be exercised. If the court below was wrong, then the possible ill effects in the area of international investment and trade are so important as to call for speedy correction. But even if this Court should hold the court below to have been right, it is still important that the pronouncement be made by this Court, so that Congress, private investors here and abroad (who may thereby be enabled to protect themselves against loss) and the foreign equivalents of the APC may be made aware of the controlling interpretation given the Act by the court of last resort.

3. Because of its construction of the statute as reaching property normally considered as located abroad, the court below, in order to avoid constitutional difficulties, found itself driven to strain construction of the statute in another direction. The court implied a right to compensation for those American obligors who might, through court decision abroad, be injured by the resulting imposition of double liability. The court recognized that in trying to reach enemy nationals' property in this situation, the APC might succeed only in taking instead the property of citizens who the APC never purported to find were "enemy nationals" within the scope of the Act and Order. Accordingly the court felt constrained to imply a right to compensation to those citizens so injured. The court, however, failed to reconcile this with the essential scheme of the Act and the Executive Order. Under that scheme, in the interest of speed under war-time conditions, the initial seizure of the property of citizens is permitted if the APC determines (mistakenly or otherwise) that the property is "enemy" owned; but the retention of property of any citizen or other person without enemy taint is not authorized, and in § 9(a) there is remedial provision for the return of any interest in seized property belonging to any such person.* That the framers of the act felt that no provision

* Clark v. Uebersee Finanz-Korp., 332 U.S. 480.

outside the Act was necessary for the protection of such persons is shown by § 7(c), which provides that "The sole relief and remedy of any person having any claim to any money or other property * * * paid over to the Alien Property Custodian, or required so to be * * * shall be that provided by the terms of this Act * * *." Neither § 9(a) nor any other part of the Act makes provision for compensation in instances where double liability may be imposed on obligors without enemy taint. Faced with the absence of statutory provision for compensation and with § 7(c), the court below did not attempt to specify any statutory basis for the right of compensation supposedly given to petitioners.

In departing from the statutory scheme thus apparently laid out by the Act, the court below cited as authority *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947). In so doing, we believe that the court below gave an interpretation to that case beyond what was sanctioned by this Court. In distinction to the opinion of the Court of Appeals for the Second Circuit in that case, the opinion of this Court, in spite of using the word "compensation" (332 U. S. at pp. 479-80), by no means makes it explicit that the remedy given the Swiss pledgees was anything other than the remedy under § 9(a). That section is readily susceptible of an interpretation that the pledgees' lien interest was an "interest [in the property] to which the court shall determine said claimant is entitled" under § 9(a). In *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947), decided the same day as the *Silesian-American* case, this Court removed doubts that might theretofore have existed as to the availability of § 9(a) to aliens without enemy taint. If the *Silesian-American* case decided no more than that the Swiss pledgees, who were not before the Court, might in a proper proceeding have a remedy under § 9(a), then that case is wholly inapplicable here, for neither the debtor nor the Bank has any "interest", in the normal meaning of the word, in the vested bonds here in issue. If the court below was wrong in its interpre-

tation of the *Silesian-American* decision, correction can come only from this Court, and should be speedy, since the importance for administration of the Act is unquestionably great. If, on the other hand, the *Silesian-American* case is susceptible of such application as the court below gave it, then we earnestly urge that its extension in this case—entailing as it does potential government liabilities not provided for by Congress in its plan for meeting obligations out of vested assets—is such as to call for reconsideration by this Court of the principle of that case.

4. The judgment in this case, if affirmed, will direct the debtor and the Bank to pay over certain amounts to the APC. In return they receive—besides the recognizably inadequate exculpatory provisions of the Act—only the statement of the court that should double liability result, the United States will doubtless make good. Petitioners of course do not quarrel with the prospect of compensation, but only with the fact that it appears so uncertain. The prospect is nebulous at best. If such a promise of compensation is to be regarded as adequate, however, despite the absence of direct statutory authority, then in all fairness the declaration should be that of the highest court, not that of a court with which other courts in this country are free to disagree.

5. Because the court below departed to such an extent from accepted views, the jarring impact of its decision is the greater. Though, as we have suggested, the need for this Court's passing on the case exists quite apart from any error in the decision below, we are—without any attempt to do more than suggest the argument on the merits—outlining some of the aspects in which that court departed from what we contend to be recognized principles:—

A. *The court below departed from the accepted principles as to jurisdiction over interests in negotiable instruments, and thereby altered the accepted meanings of the expressions "subject to the jurisdiction of the United States" and "within the United States" used in the Act and the Executive Order.*

The authority of the APC to vest is limited under § 5(b) of the Act to property "subject to the jurisdiction of the United States," and under the applicable Executive Order to property "within the United States."* The legislative history of the Act shows no intention on the part of Congress to depart from the accepted meaning of the language it used, nor is there any indication that the Executive Order attached any unusual significance to its phrase.**

A negotiable bond cannot be said to be subject to the jurisdiction of, or within, the United States if neither the instrument nor its holder is here. It has been a cardinal principal of the law of negotiable instruments, exemplified by decisions of this and other courts, that a state has no power to determine, or cut off, the rights of holders of nego-

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* See footnote, p. 5.

** The court below believed that it found in § 9(n) of the Act (enacted—see 45 Stat. 272—as part of the Settlement of War Claims Act of 1928) indication of congressional intent that the vesting provision of § 5(b) should apply to bonds not in the possession of the APC. This evidence of intent is by no means conclusive. In the first place, the Act, in § 7(d), makes provision for voluntary payments or transfers to the APC, and § 9(n) refers to returns in such cases as well as in cases of vesting. Moreover, § 9(n) was a remedial provision relating to returns to purchasers or assignees of securities where there had been vesting or transfer without seizure: the fact that Congress subsequently felt impelled to give a remedy in that situation does not indicate Congressional approval of any previous vesting of negotiable bonds without seizure. Even more important, however, is the fact that § 9(n) need suggest no more than that non-negotiable bonds might have been so vested. The language of the Congressional Reports (Sen. Rep. No. 273, at p. 30, H. R. Rep. No. 17, at p. 21, 70th Cong. 1st Sess.) in stating the purpose of the measure suggests that stocks were primarily in mind, since the reference in each case is to the "certificate". The Reports similarly referred to "assignments", which is not a term associated with the negotiation of bonds.

tiable instruments where there is no jurisdiction over either the holders or the instruments.

Bank of Jasper v. *First Nat. Bank*, 258 U. S. 112, is directly in point. There this Court dealt with an effort, not unlike that of the APC in the case at bar, to have negotiable certificates of deposit in the hands of a non-resident holder declared void, and to have the obligation represented by the certificates declared to be payable to the claimants. Distinguishing the situation from that where the "indebtedness, if it had rested in open account, would have been the property of the creditor within the State of Florida," the Court, in an opinion by Mr. Justice Brandeis, held that the judgment granting the relief sought was void for want of jurisdiction:

> "Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. * * * As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. at p. 119)

This is the rule in New York, where the bonds are payable, and elsewhere. *Von Hesse* v. *Mackaye*, 55 Hun 365, *aff'd on opinion below*, 121 N. Y. 694; and see cases discussed in 2 Daniel, *Negotiable Instruments* § 930 (7th ed. 1933), Drake, *Attachment* §§ 587, 588, Annotation, 71 A. L. R. 581, and Andrews, *Situs of Intangibles in Suits against Nonresident Claimants*, 49 Yale L. J. 241, 244, where, after reviewing the authorities, the author found it "safe to conclude that the situs of the bonds themselves is the only situs for the jurisdiction *in rem* over obligations evidenced by bonds."

Whether the reason assigned be that the property is embodied in the bonds and is therefore not within the jurisdiction (e. g., *State* v. *Barnett*, 245 Mo. 99, 149 S. W. 311) or that it is impossible either effectively to enjoin negotiation of the instruments or to notify bona fide purchasers so as to protect the obligors (e. g., *Clark-Wilcox Co.* v.

Northwest Engineering Co., 314 Mass. 402, 50 N. E. 2d 53), there has emerged from the cases the principle summed up in 1 Beale, *The Conflict of Laws* § 103.1: "A bond is always regarded as situated where it is found, and action to reach and deal with bonds may therefore be brought in the state where the bonds are found; and on the other hand an action of the sort cannot be brought where neither the bonds nor the owner of them are within the state * * *." See also Restatement, *Conflict of Laws*, § 52.

This rule is but expressive of the view, obtaining throughout the commercial world, which regards bonds as embodying the property they represent. The court below appeared to regard this view as nothing but a survival of archaic notions.* However, as Mr. Justice Holmes said for the Court in *Wheeler* v. *New York*, 233 U. S. 434, 439, "It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men." Cf. *In re Rapoport's Estate*, 317 Mich. 291, *cert. denied*, 332 U. S. 764; *First Trust Co. of St. Paul* v. *Matheson*, 187 Minn. 468, 246 N. W. 1; U. S. Treas. Reg. 105 § 81.50; and see *Bozant* v. *Bank of New York*, 156 F. 2d 787, 790 (2d Cir. 1946).

The error of the court below and the soundness of the generally recognized view is shown by the very opinion of the court below, which had to admit the ineffectiveness of the action of the APC to reach the rights of the holder and transfer them to himself. The opinion states that "in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Cus-

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* The court below (R. 58-59) also regarded this view as overcome by the development of the rule that equity will enforce recovery on a bond which is lost, stolen or mutilated. However, the price exacted by equity is protection of the obligor by suitable indemnity bond. See, *e. g.*, Prescott *v.* Williamsport & N. B. R. Co., 159 Fed. 244. Indeed, equity jurisdiction of actions on missing negotiable bonds arose originally from the fact that courts of law could not require the necessary indemnity. 3 Pomeroy, *Equity Jurisprudence* § 832 (5th ed. 1941). In this case the APC has not offered to furnish any indemnity bond.

todian by hypothesis is not the holder" (R. 60). This is merely a recognition of the hard fact that the United States through the exercise of its power has not vested the bonds or "obligations"; the effect of the Vesting Order, if sustained, is only to compel the payment of a sum of money to the APC without destroying the obligation of the debtor to the holder of the instrument. As the court below phrased this: "When [the APC] compels the obligor to pay him, he 'takes' the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects * * *." (R. 60.)

The generally recognized view which regards bonds as embodying the property they represent, is based upon the practicalities of a long history of finance and trade which emphasizes the importance of free transfer of negotiable instruments from hand to hand, without the necessity that a purchaser in good faith go beyond the instrument itself in seeking to ascertain his rights. It was in the framework of this view that Congress enacted the Act, which, like other Federal statutes, perforce assumed the existence of, and sought application to, property rights and obligations as created and recognized by existing law.

B. *The court below departed from the accepted view that a vesting order cannot alter the nature of the obligation vested.*

The obligations of Cities Service and the duties of the Bank, as trustee, are governed by the provisions of the debentures and the related indentures. Neither indenture makes any provision for the issuance of a new debenture to replace one already issued except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen and provision has been made for adequate indemnity, satisfactory to the debtor and the trustee, against possible double liability. The obligation for payment either of the debentures or of the coupons appertaining thereto is conditioned upon presentation of the instruments for cancellation. Whatever the obligation purportedly vested by the vesting order, there was

in fact and law no obligation on the part of Cities Service or the Bank to pay principal and interest of the debentures or to issue new debentures otherwise than in accordance with the terms thereof and provisions of the indentures. As this Court has recently suggested in *McGrath* v. *Manufacturers Tr. Co.*, 338 U. S. 241, 249-251 (1949), the APC cannot vest a non-existent obligation nor call it into being by declaring it to exist. It would seem to follow therefore that the APC cannot create an obligation different from one actually existing and then hold the supposed obligor to the terms of the APC's creation.

The mere removal of certain requirements as to methods of proving ownership (*cf. Gt. Northern Ry.* v. *Sutherland*, 273 U. S. 182 (1927)) is readily distinguishable from an attempted alteration of the obligations of a debtor and the duties of a trustee.

C. The court below departed from accepted principles of constitutional law in treating a promise to compensate which that court implied, as adequate to save the constitutionality of a statute which as construed by that court sanctions a taking of private property without express provision for ascertainment and payment of compensation.

The decision below rests upon what appears to be a novel theory of constitutional law. Ignoring the difficulty in reconciling the statutory scheme of the Act with the existence of an implied promise to compensate for any "taking" of property as a result of double liability, the Court of Appeals adopted a deceptively simple line of reasoning. From the premise that an uncompensated taking imposes on the Government an implied obligation to pay compensation, it proceeds to the conclusion that, therefore, a court may lend its powers to assist in a taking pursuant to a statute which does not provide for compensation. It would follow that no taking could be unconstitutional since, it would seem, the mere threat of unconstitutionality would suffice to give rise to the saving right of compensation. Such a view conflicts with the

well recognized rule that whenever private property is taken for public use "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." *Sweet* v. *Rechel*, 159 U. S. 380, 399. See also *In re Manderson*, 51 Fed. 501 (C. A. 3d); *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 238; *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540, 567-568, 570; *Commissioner* v. *Kieselbach*, 127 F. 2d 359, 363 (C. A. 3d); *United States* v. *Prince William County*, 9 F. Supp. 219, 221 (D. C. E. D. Va.), *aff'd on opinion below*, 79 F. 2d 1007 (C. A. 4th), *cert. denied*, 297 U. S. 714.

The cases cited by the court below in support of the principle that an implied promise to pay compensation arises when the Government takes private property for public use, have to do, not with judicial enforcement of Governmental demands to deliver property, but with rights created in dispossessed owners by exercise of the Governmental powers, as e. g., the flooding of fast lands in the course of constructing a dam, *United States* v. *Lynah* 188 U. S. 455, or the imposition of a servitude on land by appropriating the air above it by regular, low-level airplane flights. *United States* v. *Causby*, 328 U. S. 256. But where the Government invokes the aid of a court to put it in possession of property it seeks to take, it seems clear that there must be reliance upon the terms of a statute which affords to the owner "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation* v. *Kansas R. Co.*, 135 U. S. 641, at p. 659). As the cases above cited demonstrate, no statute can afford such reasonable, certain and adequate provision unless it recognizes the right of the owner to just compensation, and makes provision for the prompt determination and payment of such compensation from the public funds.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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September, 1951

APPENDIX

Statute

TRADING WITH THE ENEMY ACT, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

* * * * *

Sec. 5.

* * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit

of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * *

Sec. 7.

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality

of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of

enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

Sec. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution

of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order

EXECUTIVE ORDER No. 9193, July 6, 1942, 7 Fed. Reg. 5205, as amended, Exec. Order 9567, June 8, 1945, 10 F. R. 6917; 3 C. F. R., 1943 Cum. Supp. 1174.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in

the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *.